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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, Lawton Chiles, Governor,

Cross-Petitioners,

v.

SEMINOLE TRIBE OF FLORIDA,

Cross-Respondents.

On Petition For Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TEXAS AND WYOMING IN SUPPORT OF FLORIDA'S CROSS-PETITION FOR CERTIORARI AND FLORIDA'S RESPONSE TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Upon dismissal of a suit on Eleventh Amendment grounds, may an Indian tribe directly request the prescription of gambling procedures from the Secretary of Interior?

II. Does Eleventh Amendment immunity invalidate statutory provisions, allowing the courts to fashion new remedies not prescribed by statute?

III. Should this Court uphold the Eleventh Amendment sovereign immunity of States from suit in federal court by Indian Tribes under the Federal Indian Gaming Regulatory Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF AMICI STATES	1
SUGGESTION FOR CONSOLIDATION	3
SUMMARY OF ARGUMENT	4
ARGUMENT I.	
UPON DISMISSAL OF A SUIT UNDER IGRA ON ELEVENTH AMENDMENT GROUNDS, AN INDIAN TRIBE IS NOT ENTITLED TO THE PRESCRIPTION OF GAMING PROCEDURES BY THE SECRETARY OF INTERIOR	5
ARGUMENT II.	
ELEVENTH AMENDMENT IMMUNITY IS A JURISDICTIONAL BAR AND DOES NOT INVALIDATE STATUTORY PROVISIONS AS UNCONSTITUTIONAL	10
ARGUMENT III.	
THIS COURT SHOULD RESOLVE THE CONFLICTS IN THE COURTS OF APPEAL BY UPHOLDING ELEVENTH AMENDMENT SOVEREIGN IMMUNITY	12
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
CASES	
Alaska Airlines, Inc. v. Brock, 480 U.S. 685 (1987)	10
American Federation of Gov. Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982)	9
Apache Tribe of Mescalero Reservation v. New Mexico, CIV 92-076-JC, Slip Op. (DC N.M., Dec. 22, 1992)	11
Buckley v. Valeo, 424 U.S. 1 (1976)	10
Cabazon Band of Mission Indians v. California, 480 U.S. 202 (1988)	8
Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (1993)	12
Ex parte Young, 209 U.S. 123 (1908)	13
Federal Radio Com. v. General Electric Co., 281 U.S. 464 (1930)	11
Flast v. Cohen, 392 U.S. 83 (1942)	11
Landgraf v. USI Film Products, ___ U.S. ___, 62 U.S.L.W. 4255 (April 26, 1994)	8
Mistretta v. United States, 488 U.S. 361 (1989)	9
Northwest Airlines, Inc. v. Transportation Workers, 451 U.S. 77 (1981)	8
Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)	10
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)	13
Poarch Band of Creek Indians v. Alabama, 11th Cir. No. 92-6244	1, 3

TABLE OF AUTHORITIES – Continued

Page

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) 12

Seminole Tribe of Florida v. State of Florida, 11 F.3d 1016 (11th Cir. 1994) 1, 3, 6, 10, 13

Seminole Tribe of Indians v. State of Florida, 801 F.Supp. 655 (S.D.Fla. 1992) 12

Spokane Tribe of Indians v. State of Washington, ___ F.3d ___, 1994 WL 316443 (1994) 12

Sycuan Band of Mission Indians v. Roache, 788 F.Supp. 1498 (S.D. Cal. 1992) 8

United States v. Sisson, 399 U.S. 267 (1970) 12

CONSTITUTIONAL PROVISIONS

U.S. Const., Article III, § 2, clause 1 ....., 11

U.S. Const., Eleventh Amendment ...1, 3, 9, 10, 12, 13, 14

STATUTES

18 U.S.C. § 1166, *et seq.* 3, 4

25 U.S.C. § 2710(B)(i)-(vi) 6, 7, 10

25 U.S.C. § 2701, *et seq.* 3, 4

25 U.S.C. § 2710(d)(7) 7

25 U.S.C. § 2710(d)(7)(A)(i) 5, 6, 7, 10

25 U.S.C. § 2710(d)(7)(B)(vii) 6, 7, 9

25 U.S.C. § 2710(d)(7)(B)(vii)(I) 7

OTHER AUTHORITIES

Senate Report 100-446, S. 555, 100th Cong., 2d. Sess. 7

INTEREST OF AMICI STATES

Amici States of the Union now face the prospect, as a result of Part V of the decision of the Court of Appeals,[1] that Indian tribes will bypass procedures established by the Congress for the negotiation and completion of tribal-state compacts for serious gambling on Indian lands in those states. While holding principally that the Eleventh Amendment bars suit by an Indian tribe in federal court against an unconsenting state, the Eleventh Circuit added – almost as an afterthought – that the tribe may notify the Secretary of Interior whenever such a suit is dismissed, and the secretary may prescribe gaming. This legal error converts the States' Eleventh Amendment sovereign immunity into a means to subvert the will of Congress and the sovereignty of the states. Moreover, this judicially-created remedy allows the tribes to request that the Secretary prescribe casino gambling, even in states where it is criminally prohibited, on Indian lands, again contrary to the will of Congress and the sovereign states and principles of federalism. Indeed, the tribes and the Secretary may use the *states'* judicial sovereign immunity as a sword to bypass the tribal-state compacting procedures envisioned by Congress and impose as a matter of federal regulation the gambling requested by tribes.

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[1] Case below consolidated under *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), holding principally that Eleventh Amendment is a bar to suit by an Indian tribe in federal court against an unconsenting State (Part IV). The consolidated decision reversed the district court decision in *Seminole Tribe of Florida v. State of Florida*, 11th Cir. No. 92-4652, and affirmed *Poarch Band of Creek Indians v. Alabama*, 11th Cir. No. 92-6244. 11 F.3d at 1029. This identical amicus brief, less Argument III, was filed July 5, 1994, in support of Alabama in *Poarch Creek Indians*, No. 94-35.

Congress provided for such a secretarial remedy only upon the judicial finding of a lack of good faith by a state to negotiate for that gambling which the state must negotiate. However, experience shows that upon a state's good faith refusal to negotiate for that gambling which it criminally prohibits for all purposes, such as blackjack, slot machines or electronic games of chance, tribes have sued states in federal court claiming a lack of good faith, evoking an Eleventh Amendment defense. The legal error of the court leaves states in the untenable position of facing tribal demands for casino gaming that is criminally prohibited in those states, followed by suit in federal court when the states do not negotiate for the criminally-prohibited gaming. By purposefully evoking a defense of sovereign immunity, tribes may *ab initio* bypass altogether the requirement to negotiate a tribal-state compact, leaving states subject to unbridled federal power to impose a scheme that may be entirely contrary to the states' criminal law.

Amici states believe the Court of Appeals legally erred in this case by reading into a federal statute a remedy for tribes that does not exist and which properly could not have been fashioned in the absence of any Congressional direction. Amici states also have an acute interest in the proper determination of the question of the applicability of Eleventh Amendment sovereign immunity to suits brought by tribes under IGRA.

SUGGESTION FOR CONSOLIDATION

Amici States respectfully suggest that this Court consider consolidating this case with *Poarch Band of Creek Indians v. State of Alabama*, U.S. Supreme Court No. 94-35 (petition for certiorari). Both *Seminole* and *Poarch Creek Indians* come to this Court from a single decision of the U.S. Court of Appeals for the Eleventh Circuit, *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), in which the circuit court had consolidated the two cases below (*Poarch Creek Indians*, 11th Cir. No. 92-6244, consolidated with *Seminole*, 11th Cir. No. 92-4652, decided Jan. 18, 1994).

Both cases presented the Eleventh Circuit with the same issue, namely, whether the Congress has the power to abrogate the Eleventh Amendment sovereign immunity from suit in federal court by enacting the Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21, 18 U.S.C. §§ 1166-68). The Eleventh Circuit upheld that sovereignty as applied equally to the two cases, in a single decision. In Section V of that decision, it also suggested a remedy for Indian tribes facing a jurisdictional bar. It is from that language that Alabama seeks certiorari in No. 94-35, and the exact same language from which Florida seeks review in its cross-petition for certiorari in this case. Additionally, the Seminole Tribe seeks certiorari on the main holding of the decision, also in this case. The cases below arose in a similar fashion for both Alabama and Florida, upon suits brought by Indian tribes in the federal court, with the respective federal courts resolving the Eleventh Amendment question with diametrically opposite results. The Eleventh Circuit recognized this fact

in consolidating the cases and deciding the question. In the interest of judicial economy, and given the importance to all the States of resolving the issues presented by both Alabama and Florida, amici respectfully suggest these two cases be consolidated by this Court.

SUMMARY OF ARGUMENT

States are subject to the provisions of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701, *et seq.*, and 18 U.S.C. § 1166, *et seq.*[2] As provided by IGRA, states must negotiate tribal-state compacts with Indian tribes for class III gambling activities (all significant gambling beyond bingo and non-banked card games), and face suits by tribes in federal court to enforce the negotiating process. The Court of Appeals' final statement in Part V of the opinion that the tribes may notify the Secretary of Interior (and that the Secretary may then act to prescribe procedures for class III gaming) whenever such a suit is dismissed for subject-matter jurisdiction on Eleventh Amendment grounds is not supported by the statute and arrogates to the Secretary powers not delegated to that official by the Congress.

The states welcome the Court of Appeals' principal holding that an unconsenting state may not be sued in federal court by an Indian tribe under IGRA, as it goes to the heart of the constitutional scheme balancing the powers of the states and the Federal Government. However, the Court's final statement concerning the tribe's

[2] Amici states Maine, Massachusetts, and Rhode Island contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

remedy and the Secretary powers is inconsistent with the congressional directive and adversely affects the states. As the case before the courts is to be dismissed for subject matter jurisdiction, the court below was not free to engage in an analysis of severability or to fashion a remedy not envisoned by the Congress. For that reason, amici states respectfully urge this Court to reverse the ruling in Part V of the opinion, and affirm the core holding that Congress does not have the power to abrogate States' sovereign immunity under the Indian Commerce Clause.

ARGUMENT

I.

UPON DISMISSAL OF A SUIT UNDER IGRA ON ELEVENTH AMENDMENT GROUNDS, AN INDIAN TRIBE IS NOT ENTITLED TO THE PRESCRIPTION OF GAMING PROCEDURES BY THE SECRETARY OF INTERIOR

The Court of Appeals, in Part V of the opinion, incorrectly states that where a state "pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, *pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary may then prescribe regulations governing class III gaming on the tribe's lands.*" *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); italics added. This procedure, however, does not appear in 25 U.S.C. § 2710(d)(7)(B)(vii), as cited,[3] or anywhere else in IGRA.

[3] All cited sections refer to Title 25 of the United States Code.

At the beginning of Part V of the opinion, the Court of Appeals notes that the procedures in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit. *Seminole*, at 1029. This logically follows the Court's holding that the Eleventh Amendment serves as a jurisdictional bar to suit against an unconsenting state. *Ibid*. However, following the adoption of a severability analysis, the Court of Appeals reasoned that the final clause of section 2710(d)(7)(B), clause (vii), provided below, is somehow unaffected by the jurisdictional bar. By its plain language, however, that clause like the clauses preceding it, is inextricably tied to the jurisdiction of the federal court. As is evident, it is tied to the very clauses preceding it, from which it derives its meaning. Clause (vii) provides:

> "If a State does not consent during *the 60-day period described in clause (vi)* to a *proposed compact submitted by a mediator under clause (v)*, the *mediator shall notify* the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –
>
> "(I) which are *consistent with the proposed compact selected by the mediator under clause (iv)*, the provisions of this Act, and the relevant provisions of the laws of the State, and [] (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribes has jurisdiction."

Italics added.

Clearly, IGRA, at § 2710(d)(7)(B)(vii), contemplates the continuation of the process initiated with the lawsuit

in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi). It is the *court-appointed mediator*, not the tribe, who notifies the Secretary of Interior, and only upon the refusal of a state to consent to the compact proposed by the mediator in clause (v).

The Secretary, in turn, is empowered solely to respond to a mediator's notification and may prescribe only those class III gaming procedures *consistent with a proposed compact selected by a mediator*. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Congress did not provide that tribes would be authorized to notify the Secretary directly with a request for class III gaming. Nor did it provide the Secretary with powers to prescribe gaming procedures independent of a court-appointed mediator's selected compact. Congress envisioned these procedures as a *limitation* upon the Secretary of Interior, following multiple opportunities to resolve outstanding differences between a state and tribe once litigation has arisen. To provide a remedy independent of the statutory process would be like proceeding to sentencing once a criminal defendant asserts the protection of the Fifth Amendment. Congress attempted to provide a process which protected the significant interests of the parties. Indeed, Congress noted the entire § 2710(d)(7) was

> " . . . the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of the States in regulating such gaming."

Senate Report 100-446, S. 555, 100th Cong., 2d. Sess., 14.

The Committee noted that the provision permitting the tribe to sue the state on the basis of a lack of good-faith negotiation was designed as the least offensive

option "to encourage States to deal fairly with tribes as sovereign governments," *ibid.*, but also noted that the state had legitimate governmental interests to protect, including an interest in regulating class III gaming. Congress made no provision for the Secretary to substitute his discretion for that of the state, particularly in deciding important and difficult issues of state gambling law. It instead limited the Secretary to actions consistent with the exercise of a mediator's discretion. Congress could have provided an alternate means for the tribe to request class III gaming from the Secretary and for the Secretary to respond to that request, but Congress did *not* provide any such mechanism. The Court of Appeals is not free to fashion remedies that Congress has specifically chosen not to extend. *Landgraf v. USI Film Products*, ___ U.S. ___, ___, n. 36, 62 U.S.L.W. 4255, 4267, n. 36 (April 26, 1994); see *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77, 97 (1981).

Amici states now face the prospect that the Court of Appeals' statement, will be offered by Indian tribes to the Secretary of Interior as a by-pass mechanism to serious negotiations and a new judicially-created protocol for the Secretary to entertain requests for class III gaming. The difficulty arises whenever a state refuses to concede to tribal demands for casino-type class III gaming which violates state law, but which a tribe maintains is "part of the public policy of the state" under *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1988). In California and Texas, federal district courts have opined that certain casino-type games are properly the subject of negotiations, notwithstanding the criminal prohibitions on this activity. See, e.g., *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1503 (S.D. Cal.

1992). Where the state believes that it need not negotiate for such activity, it faces the prospect of a lawsuit by the tribe for failure to negotiate in good faith, with the possibility of an unwanted mediation and secretarial procedures consistent with an appointed mediator's decision. Under such conditions, the unequal burden is on the state, which must then concede to the tribal demands or face the possibility that an appointed mediator's discretion will be substituted for the discretion of the state. It is under these and similar circumstances that certain states have raised the Eleventh Amendment as a bar to the lawsuits. In other states there are constitutional or other internal impediments to the express waiver of state sovereign immunity.

In any case, states have no reason to expect that upon dismissal of a suit for lack of subject-matter jurisdiction the Secretary of Interior has the unfettered power to consider tribal requests for class III gaming, as this is simply not evident in the statute. Instead, the Secretary's powers rest on the jurisdiction of the federal court to order compact negotiations and appoint a mediator, who, in turn, must follow statutorily-prescribed procedures before the Secretary may act upon the appointed mediator's notification and compact selection. Congress specifically granted the Secretary limited *regulatory* discretion in § 2710(d)(7)(B)(vii), namely, to prescribe consistently with an appointed mediator's compact selection; in this subsection, the Secretary has no power to decide a matter involving *legislative* discretion, such as what class III gaming to permit or not permit. See *American Federation of Gov. Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982). While broad delegations of power have been upheld, see *Mistretta v. United States*, 488 U.S. 361, 373-374 (1989), by

contrast here, IGRA grants a narrow *regulatory* discretion to the Secretary. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-430 (1935).

II.

ELEVENTH AMENDMENT IMMUNITY IS A JURISDICTIONAL BAR AND DOES NOT INVALIDATE STATUTORY PROVISIONS AS UNCONSTITUTIONAL

The court-fashioned secretarial remedy discussed above is apparently premised on the Court of Appeals' conclusion that the lawsuit and mediation provisions in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) were severable from IGRA. Amici states submit the severance analysis is legally incorrect. In concluding that the Eleventh Amendment serves as a jurisdictional bar in IGRA, the Court of Appeals has upheld the states' sovereign immunity as a defense to certain actions. The Court of Appeals did not, however, hold the lawsuit and mediation provisions in IGRA to be unconstitutional. In fact, in footnote 15, the Court below noted that a state may consent to suit, *"in which case these provisions remain in full force."* If the provisions remain in full force for states consenting to suit and are barred for lack of subject-matter jurisdiction for states not consenting to suit, the provisions are not unconstitutional; the Court of Appeals did not invalidate them. As the Court of Appeals decided, the provisions are subject to a *defense* of lack of jurisdiction in certain cases. Were the provisions invalid as contrary to the Constitution, they should be dropped altogether. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Unconstitutional provisions must be severed from the statute. *Alaska Airlines, Inc. v. Brock*, 480

U.S. 685 (1987). However, the lawsuit provisions of IGRA cannot be unconstitutional and severable on the one hand and *"remain in full force"* here and there, as acknowledged by the Court of Appeals, *Seminole*, n. 15.

By upholding the constitutional validity of the Eleventh Amendment as a jurisdictional bar, the Court of Appeals determined that the case must be dismissed for lack of subject-matter jurisdiction. Thus, it cannot properly reach the question of severability or whether other remedies might work for the tribe under IGRA. Indeed, upon affirmance of the dismissal for lack of subject matter jurisdiction, there is no further "case or controversy," within the meaning of Article III, § 2, clause 1, of the Federal Constitution, before the Court of Appeals. The court cannot give decisions which are primarily advisory, nor can it exercise functions which are essentially legislative. *Federal Radio Com. v. General Electric Co.*, 281 U.S. 464, 469 (1930); *Flast v. Cohen*, 392 U.S. 83, 95 (1942).

As the bar of the Eleventh Amendment is jurisdictional, once the action is found to be barred, a severance analysis and further interpretation is inappropriate. See *Apache Tribe of Mescalero Reservation v. New Mexico*, CIV 92-076-JC, Slip Op. at 2 (DC N.M., Dec. 22, 1992).[4] Further, dismissal on Eleventh Amendment grounds bars the consideration of the merits of the underlying action.

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[4] " . . . it would be improper for this Court to address the severability issue raised by the Apache Tribe of the Mescalero Reservation [having] already found that the Eleventh Amendment precludes this action in federal court absent waiver by the State of its immunity in a federal forum." *Apache Tribe*, Slip Op. at 2.

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605, 613 (1993); *United States v. Sisson*, 399 U.S. 267, 270 (1970). Here, the Eleventh Circuit, upon affirming the *Poarch Band* dismissal on Eleventh Amendment grounds, continued with a severance analysis and substantive commentary, including the creation of a judicial remedy not expressed by the Congress. This analysis and the creation of a remedy not found in IGRA has far-reaching and destructive consequences to significant State governmental interests.

III.

THIS COURT SHOULD RESOLVE THE CONFLICTS IN THE COURTS OF APPEAL BY UPHOLDING ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Amici States also agree with Florida in its Response to the Petition for Certiorari that this Court should resolve the conflicts in the Courts of Appeal as to whether the Eleventh Amendment is a jurisdictional bar to suit by tribes against States in the federal court under IGRA. The Eighth Circuit Court of Appeals in *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 280-81 (1993), and, most recently, the Ninth Circuit in *Spokane Tribe of Indians v. State of Washington*, ___ F.3d ___, 1994 WL 316443 (1994), both relied upon the language of the District Court in *Seminole Tribe v. State of Florida*, 801 F.Supp. 655, 657-63 (S.D.Fla. 1992), that Congress had the power to abrogate state sovereign immunity in IGRA under the Indian Commerce Clause. That very language of the District Court was disapproved and reversed by the Eleventh Circuit in this case. The Eleventh Circuit

held that notwithstanding Congress' intent to abrogate states' sovereign immunity, Congress lacks the *power* to do so under the Indian Commerce Clause, noting that the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), cannot be extended to the Indian Commerce Clause. This derives, the court noted, from the fundamentally different purposes underlying the two clauses. *Seminole Tribe of Florida v. State of Florida*, 11 F.3d at 1027.

Amici States agree with Florida that this Court should address the Eleventh Amendment issue, but like Florida, do not accede to the arguments of the petitioning Tribe. The Eleventh Circuit properly found the Interstate and Indian Commerce Clauses distinguishable, correctly limited the plurality holding in *Union Gas* to the Interstate Commerce Clause, and properly rejected the application of the exceptions set forth in *Ex parte Young*, 209 U.S. 123 (1908). If this Court were to review these cases, amici States will argue the correctness of the Eleventh Circuit holdings on the Eleventh Amendment core issues.

CONCLUSION

For the reasons stated herein, amici states respectfully urge this Court to review and affirm the core Eleventh Amendment holdings, but to reject Part V of the opinion below.

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